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No. 89-1811

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY, INC.,

Petitioner,

v.

DANIEL KIMBRO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

To Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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Respondent, Daniel Kimbro ("KIMBRO"), opposes the Petition for Writ of Certiorari served May 15, 1990, by Atlantic Richfield Company, Inc. ("ARCO").

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals erred in its application of the rule that a District Court's oral opinion may be utilized to interpret and augment consistent written findings of fact. The threshold issue is whether this substantive issue merits review by this Court.

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STATEMENT OF THE CASE

A. Introduction

Originally filed in state court and removed by ARCO on diversity grounds, this case raises factual issues of reasonable accommodation of an employee's handicap under Washington state law.

Daniel Kimbro was a ten-year handicapped employee who was fired when his handicap prevented his meeting ARCO's newly-established attendance standards. No accommodation to his handicap was offered or made. KIMBRO contended at trial that reasonable accommodation would have permitted him to keep his job. He proposed three specific accommodations.

In a detailed oral opinion, the trial court found that KIMBRO's condition (a neurological impairment known as cluster migraine) is a handicap under Washington law, and that one of the accommodation theories KIMBRO had urged at trial, allowing him a leave of absence to endure an acute phase and to seek effective medical treatment, would have been a reasonable accommodation. Characterizing ARCO's treatment of KIMBRO as "shabby," and expressing regret at the decision, the trial court dismissed the case as a matter of law on agency principles, refusing to impute KIMBRO's supervisor's knowledge of his handicap to ARCO. Resolution of the reasonable accommodation issue therefore was not necessary to the holding. Thus, the court's statements on reasonable accommodation were not incorporated in its Findings and Conclusions, despite the court's clear statement that reasonable accommodation was possible but had not been made.

In a 3-0 decision, the Ninth Circuit Court of Appeals reversed the agency decision, finding ARCO responsible to provide reasonable accommodation because KIMBRO's direct supervisor had knowledge of his handicap. ARCO's petitions for rehearing and for rehearing *en banc* both were denied. Order, Appendix D.

ARCO does not dispute the Ninth Circuit's decision reversing on the agency issue. ARCO contends that this Court should review a factual issue: whether the District Court's oral opinion regarding reasonable accommodation (which was adopted by the Ninth Circuit) was consistent with the District Court's Findings and Conclusions (which did not address the reasonable accommodation issue due to the court's erroneous holding on the agency issues).

This is a factual issue which does not merit review by this Court. Supreme Court Rule 10.1.

B. Discussion of Background Facts and State Law

Under the Washington State Law Against Discrimination, Wash. Rev. Code §§49.60.010, .030 and .180, an employer is required to make "reasonable accommodation" of an employee's handicap, and is liable in damages for failure to do so. What constitutes a "reasonable accommodation" is a question of fact. *Reese v. Sears Roebuck & Co.*, 107 Wash.2d 563, 731 P.2d 497 (1987); *Dean v. Metropolitan Seattle*, 104 Wash.2d 627, 708 P.2d 393 (1985).

At trial, KIMBRO proposed three accommodations which would have permitted him to keep his job. Extensive evidence and argument were heard on each. The three proposed accommodations were:

1. Continuing the past practice allowing him to use accumulated sick leave to cover handicap-related absences:

2. Continuing the past practice allowing him to make up lost time due to his handicap by working after normal operating hours; and

3. Granting a leave of absence in June, 1981 (when he was terminated) to allow him to make it through an acute phase of his handicap and seek long-term effective treatment for the condition.

The trial court discussed all three of these options in the oral opinion. It concluded that the first two were not practical, but that the third, a leave of absence, would have been a reasonable accommodation. None of these findings was specifically set forth as factual findings, in view of the court's conclusion that "because ARCO management did not know of KIMBRO's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, RCW 49.60." (Conclusion of Law 3, Appendix B to Petition.) Written findings on specific options

for reasonable accommodation were not germane to a decision finding no obligation to accommodate. The trial court's views on reasonable accommodation were clear from the oral opinion, and the Findings and Conclusions were consistent with that opinion.

The Ninth Circuit reversed the trial court's resolution of the agency issue, holding that KIMBRO's supervisor's knowledge of his medical condition and handicap must be imputed to ARCO under agency principles of Washington state law. *See* Opinion of Ninth Circuit, Appendix C, at C14-15; *Zwink v. Burlington Northern Company*, 13 Wash. App. 560, 566, 536 P.2d 13, 17 (1975) (quoting 3 Am.Jur.2d *Agency* §273 at 635 (1962); Restatement (2d) of Agency §268 *et seq.*) (ARCO does not contest the reversal.)

Once the agency issue had been resolved and ARCO's duty to make reasonable accommodation established, the Court of Appeals relied on the trial court's oral opinion and findings on the accommodation issue. *Southern Pacific Land Company v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030. The court also noted that "no evidence in the record even remotely suggests that offering KIMBRO a leave of absence in 1981 would have placed an undue hardship on ARCO," a defense which ARCO had the burden of proving under Washington Law. Wash. Admin. Code §162-22-080.

ARGUMENT

The Petition for Certiorari should be denied because the issue presented does not meet this Court's standard for review. The issue is factual, and plainly frivolous in view of Washington state law. Its resolution will affect no one except the parties to this case.

A. The Issue Presented Does Not Meet this Court's Standards For Review

This petition asks this Court to review the decision of the Ninth Circuit for consistency with the trial court's oral opinion. The rule that an appellate court may properly consider a trial court's oral opinion consistent with its formal findings is not challenged. Instead, the assertion is that the rule did not apply here because, as a factual matter, the oral opinion and written findings were in some way inconsistent.

This issue does not merit review by this Court. Whether an oral opinion is consistent with written findings on a factual issue is itself a factual question of language construction. This does not meet any of this Court's standards for review, articulated in Supreme Court Rule 10.1.

The Ninth Circuit decided this case properly, but even if that were not the case, the issue would be confined to this case. The case presents no general question or problem likely to affect others in the future. Thus, any alleged error would not merit this Court's review. In the words of Justice Stevens,

> Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals.

Watt v. Alaska, 451 U.S. 259, 275, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) (Stevens, J. concurring); *see also Rudolph v. United States*, 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484, *rehearing denied* 371 U.S. 854, 83 S.Ct. 15, 9 L.Ed.2d 93 (1962).

B. The Petition Plainly Lacks Merit.

ARCO's petition does not cite any finding of the District Court which it claims is inconsistent with the oral opinion, which was:

> . . . In my opinion they could make accommodations, reasonable accommodations, which they did in the past. . . . They could have accommodated him by allowing him to use sick leave, had he asked for it; given him a leave of absence, had he asked for it . . .

Oral Findings, at A-2.

There was no inconsistency between this and the court's conclusion that:

> [B]ecause ARCO management did not know of KIMBRO's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination, RCW 49.60.

Conclusion of Law No. 3., Petition Appendix B-10.

Because the District Court dismissed the case on the agency issue, no findings were necessary on the reasonable accommodation issue. A trial court is not required to make unnecessary findings. *Nuelsen v. Sorensen*, 293 F.2d 454, 459 (9th Cir. 1961); *Immigration and Naturalization Service v. Bagamasbad*, 429 U.S. 24, 97 S.Ct. 200, 50 L.Ed.2d 190, 192 (1976). The trial court's oral opinion was strong and unambiguous; any finding on the issue would have necessarily repeated it.

ARCO's reliance on Conclusion of Law No. 3 is misplaced. Conclusion 3 is based entirely on the agency issue, which is not before this Court. The text of Conclusion No. 3, with emphasis added to the critical last sentence, is:

> 3. ARCO did not terminate or unlawfully discriminate against plaintiff because of a handicap, in violation of the state Law Against Discrimination, nor fail to make a legally required accommodation for plaintiff's handicaps. Furthermore, Kimbro had a duty to advise ARCO management and his supervisor's superiors of his handicap and

> the accommodation he needed from ARCO. While his supervisor knew generally that Kimbro occasionally experienced severe headaches, Kimbro should have realized that the supervisor's superiors did not know, and should have advised them himself. *Because ARCO management did not know of Kimbro's handicap, its discharge of him without making reasonable accommodation of the handicap did not violate the Law Against Discrimination. RCW 49.60.*

Concusion of Law No. 3, Petition App. B-10 (emphasis added).

Thus the trial court concluded that ARCO was excused from making the accommodation that would be required otherwise, *only* because it believed ARCO did not know of KIMBRO's handicap. That conclusion was reversed, leaving the inescapable conclusion that ARCO had failed to make a legally required accommodation.

ARCO's reliance on *Phillips v. City of Seattle*, 111 Wash.2d 903, 766 P.2d 1099 (1989) is also misplaced. That case concerned the special circumstances of alcoholism, a condition whose status as a handicap is evaluated on a case-by-case basis under Washington law. The employer was not liable in the *Phillips* case because it was determined as a factual matter that the alcoholism of the particular employee involved was not a cognizable handicap under Washington state law. In this case, KIMBRO's handicap is not at issue.

A misstatement of the record should be corrected. The Petition states that KIMBRO did not urge a leave of absence as a reasonable accommodation at the trial in this case. That is not true. At trial, KIMBRO elicited detailed information from ARCO's personnel manager about its leave of absence policies, all of which were in evidence. Excerpts of that testimony are included at Appendix H. Additionally, the issue was urged strongly (and persuasively) in closing argument; transcription may be obtained if necessary. In any event this

is a red herring: under Washington law, the employer has an affirmative duty to come forward with available options for accommodation, regardless of any request or lack of request from the employee. *Dean v. Metropolitan Seattle*, 104 Wn.2d 627, 708 P.2d 393 (1985). The Court of Appeals noted in its opinion that ARCO appeared to concede this point at oral argument (Ninth Circuit Decision, Appendix C, at C-17.)

Lastly, the cases cited by ARCO are inapposite and weigh against its position here. In each of those cases the oral opinion and findings and conclusions were inconsistent. Our case does not rise to that level: we have only a contention that failure to make a finding unnecessary to the court's holding somehow contradicts the clear statements made in the oral opinion and adopted on appeal. This is a spurious contention.

PRAYER FOR DISMISSAL

The petition raises issues which do not merit review by this Court, and plainly lacks merit in light of Washington state law and the factual background of this case. The petition should be dismissed.

Respectfully submitted this 14th day of June, 1990.

RAAS, JOHNSEN, GARRETT & STUEN, P.S.
Deborra E. Garrett
Attorneys for Respondent

APPENDIX H

Trial Testimony (Excerpted) of ARCO Employee Relations Manager Anthony Mickas (Trial Transcript pp. 543-580)

Page	*Line*	
P.543	L.11	Q. (by KIMBRO's attorney D. Garrett) What is your position?
	L.12	A. I'm in Employee Relations at the Cherry Point Refinery.
	L.13	Q. Are you the manager of the Employee Relations Department?
	L.14	A. Yes, I am.
		. . .
	L.21-23	Q. . . . One of your jobs is to manage the department that has primary responsibility for administering benefit plans. Right?
	L.24	A. Yes.
	L.25-	Q. And your department also has primary
P.544	L.1	responsibility for administering personnel policies. Right?
	L.2	A. Yes.
		. . .
P.568	L.14-17	Q. So is it fair to say that the Policies and Procedures Manual sets out policies and instructions for the administration of personnel policies and benefits? Is that a fair characterization?

Page *Line*

L.18 A. They are the basic guidelines for policy administration.

L.19-22 Q. Okay. This particular one that we're looking at says anticipated disability, leave of absence, and it's dated September 14th, 1981. Is it a continuation of a policy that existed previous to September 14th, 1981?

L.23-24 A. I would believe that this would be the same policy in effect when Kimbro was on the payroll.

. . .

P.569 L.9-13 Q. This is the only one we've look [sic] at here on anticipated disability leave of absence, but take a look through it and tell me if the policy that we have in here as Exhibit 19 is significantly different in any way that you can see from the one that was in effect when Kimbro was on the payroll?

L.14 A. It's the policy.

L.15-21 Q. Okay. Now I'd like you to take a look at the first page and read along with me, make sure I've got it right.

> "Purpose: The anticipated disability leave of absence is a voluntary leave which may be requested by an eligible employee and granted at the discretion of the company."

With me so far?

L.22 A. Yes, I am.

L.23-P.570 L.7 Q. Okay.

Page *Line*

"The purpose of this policy is to provide the conditions for granting a reasonable time off surrounding an employee's planned medical disability. This leave grants to eligible employees personal time off without pay during their non-disability absence and insures continued eligibility for company sick pay benefits during medical disability which has been certified by a physician."

Did I read that paragraph right?

L.8 A. Yes, you did.

L.9-15 Q. Okay. Now I'd like you to take a look at the second page, commencement of leave, and I think the gist of that paragraph is simply to say that this kind of leave can be granted for any reasonable period of time with a maximum of — that it should not occur in a way that allows it to total more than six months when it's combined with disability or sick leave. Is that right?

L.16 A. That's right.

. . .

P.571 L.15-17 Q. So this is a way of giving somebody a leave without pay, essentially, when it's associated with disability; is that right?

L.18 A. Yes, it is.

L.19-20 Q. Okay. Whose okay has to be given for a person to take this kind of leave?

L.21-24 A. The policy stipulates who the authorities are required — or approvals that are required.

Page	*Line*	
		I believe it's two members of management and Employee Relations that have to sign the specific section. That's my basic understanding.
P.572	L.25-L.1	Q. So this is done within the refinery. You don't need to get approval from Los Angeles or anything like that?
	L.2.	A. No.
		. . .
P.572	L.15-16	Q. And then we have some information after that about formal leaves of absence without pay; is that right?
	L.17	A. Yeah. That's the next page.
	L.18-19	Q. And it lists the types of formal leaves of absence without pay that are available to people; is that right?
	L.20	A. That's right.
	L.21-23	Q. Now, No. 2 there is disability leave of absence. That's not the same thing as what we've just been talking about, is it?
	L.24	A. No. It's different.
P.573	L.25-L.2	Q. Okay. Disability leave of absence occurs when employees have exhausted their disability benefits and remain disabled; is that right?
	L.3	A. Yes.
	L.4-6	Q. The other type or another type of formal leave of absence without pay is listed in No. 1, leave of absence without pay for personal business.

Page	*Line*	
	L.7	A. That's right.
		. . .
P.574	L.8-10	Q. Okay. No. 4 says leave of absence for educational reasons. Is that another type of leave without pay for personal reasons or is that —
	L.11-12	A. It's the same. Any leave in excess of thirty-one days would be a formal leave of absence.
	L.13-14	Q. Okay. So that's the situation you were just describing, a leave for purposes of education. Right?
	L.15	A. That's the example where the requests have come in.
	L.16	Q. Okay. Where does this document come from?
	L.17-18	A. This is also part of the Policies and Procedures in the Employee Relations office.
		. . .
P.575	L.10-11	Q Has anybody applied for this kind of leave because of a disability or health related problem?
	L.12	A. Not for this type of formal leave of absence. No.
	L.13-14	Q. Have others applied for leaves of absence for health related reasons?
	L.15	A. Yes.
	L.16	Q. Who are those people?
	L.17-23	A. Well, we have 86 females that work at the refinery and probably about 23 of them have applied for formal leaves of absence due to

Page	*Line*	
		maternity cases. In the male population that's probably happened — I haven't been there all 15 years and I'm obviously guessing at the eight or nine years I have been there — that's probably happened about nine, ten times, somewhere in that range.
		. . .
P.579	L.20-22	Q. Okay. Essentially, all these documents, do they come out of ARCO manuals that describe the policies and procedures and how they are to be administered?
	L.23-24	A. With the exception of the ones we've already talked about?
P.580	L.25-L.1	Q. Yeah. With the exceptions of the ones we've talked about.
	L.2-5	A. Well, I know that all these policies and procedures are in the manual. With regard to this reference letter, I'm not sure where you got that from, or what file I gave it to you from. I would suspect that's where it came from.
	L.6-7	Q. Okay. It probably came from your correspondence file, don't you think?
	L.8	A. It's possible.
	L.9	Q. It's stamped with your name, received, A. Mickas?
	L.10	A. Yes.
	L.11-13	Q. So that would probably indicate to you that it came from one of your files; is that right? We don't have a question that it's authentic, do we?

Page *Line*

L.14 A. No. It's fine.

L.15-17 Q. Okay. The other information setting forth the various kinds of leaves of absence, they come from ARCO manuals and documents that describe those kinds of leaves; is that right?

L.18 A. Yes.

L.19 Q. I think we can go on to the next one. That's Exhibit 20.

L.20 A. Are you finished with this one?

L.21 Q. Yes.

L.22 A. There's a lot left in this one.

L.23 THE COURT: She doesn't want to go into it.

APPENDIX I

Washington Administrative Code §162-22-080

WAC 162-22-080 Accomodation to handicapped employees. (1) It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) It is an unfair practice for an employer to refuse to hire or otherwise discriminate against an able handicapped worker because the employer will be subject to the requirements of this section if the worker is hired, promoted, etc.

(3) The cost of accommodating an able handicapped worker will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, the requirements of other laws and contracts, and other appropriate considerations.

[Order 23, § 162-22-080, filed 7/21/75.]